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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

MELVIN T. SMITH,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari to review the Massachusetts Appeals Court's decision that petitioner's Double Jeopardy rights were not implicated by the trial judge's reconsideration of her initial decision granting his motion for a required finding of not guilty as to one of the pending charges against him where: (1) there exists no important split of authority on the question presented; and (2) the Appeals Court correctly determined that petitioner's Double Jeopardy rights were not implicated?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Massachusetts respectfully requests that this Court deny the petition for writ of certiorari.

OPINION BELOW

The opinion of the Massachusetts Appeals Court (the "Appeals Court") affirming both the trial court's denial of petitioner's motion for a new trial and petitioner's convictions for assault with intent to murder, assault and battery by means of a dangerous weapon, and unlawful possession of a firearm, fourth offense, is reported as *Commonwealth* v. *Smith*, 58 Mass. App. Ct. 166, 788 N.E.2d 977 (2003), and is reproduced in the Appendix to the petition.

STATEMENT OF THE CASE

1. *Procedural History*

Petitioner seeks a writ of certiorari to the Appeals Court to review its decision, in affirming his conviction for unlawful possession of a firearm, that the trial court correctly denied his motion for a new trial, on the ground that the trial judge violated his Double Jeopardy rights when she reconsidered her initial grant of a motion for required finding of not guilty as to that charge.[1] On September 26, 1996, a Suffolk County grand jury indicted petitioner for armed assault with intent to murder and assault and battery by means of a dangerous weapon. On October 8, 1998, a Suffolk County grand jury indicted petitioner of unlawful possession of a firearm (fourth offense).

Petitioner's trial before a jury (Donovan, J., presiding) began on November 4, 1998. After the Commonwealth rested:

> [petitioner] moved for a required finding of not guilty on the charge of unlawful possession of a firearm, arguing that because the Commonwealth had not introduced direct evidence of the gun's length, the Commonwealth had not proved that the gun met the statutory definition of a firearm. The judge allowed the motion. The allowance of the motion was not communicated to the jury, but it was recorded on the docket.
>
> Later that day, after the defense had rested and before closing argument, the Commonwealth called the judge's attention to *Commonwealth v. Sperrazza*, 372 Mass. 667, 670, 363 N.E.2d 673 (1977), in which the Supreme Judicial Court held that testimony that a gun was a pistol or revolver was sufficient evidence to permit a firearm charge to go to the jury. In light of the case law, the trial judge concluded that the Commonwealth had, in fact, met the [*Commonwealth v.*] *Latimore*, [378 Mass. 671, 677-78, 393 N.E.2d 370 (1979)] standard because the Commonwealth had introduced testimony that the gun was a "pistol" and that it was a ".32 or .38," from which a jury could infer that the gun was less than sixteen inches. The judge decided to submit the charge to the jury. The docket reflects that the motion for required finding of not guilty had been reconsidered and was denied.

Commonwealth v. Smith, 58 Mass. App. Ct. at 169, 788 N.E.2d at 981-82.

On November 16, 1998, the jury convicted petitioner of all counts. Petitioner waived a jury trial on the fourth offense aspect of the firearm charge, and the court convicted him after hearing the evidence. The trial judge sentenced petitioner to twelve to fifteen years for his conviction for armed assault with intent to murder, to a concurrent nine to ten years for his conviction for assault and battery with a dangerous weapon, and to a concurrent ten to twelve years for the firearm charge.[2]

On February 14, 2001, petitioner filed a motion for new trial, asserting (among other matters) that his Double Jeopardy

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[1]Petitioner made no such motion for required finding as to the Commonwealth's proof as to his indictments for assault with intent to murder and assault and battery by means of a dangerous weapon. As such, the Petition does not concern the Appeals Court's bases for those convictions.

[2]Given the facts of petitioner's crimes, *see infra* at 4-6, as well as the manner of his sentencing, the Commonwealth respectfully takes issue with his current characterization of his firearm charge as being the "primary offense." *See* Petition, at 6.

rights were violated by the trial judge's reconsideration of her initial grant of his motion for a required finding as to the firearm charge. The trial court (Donovan, J.) denied the motion in a June 27, 2001 memorandum and order, determining that no such violation occurred where petitioner was not subjected to a second trial, the court's error was corrected before closing arguments, and petitioner had the option to re-open his case. The trial court's memorandum and order is reproduced in the Appendix to the petition.

The Appeals Court affirmed both the trial court's denial of petitioner's motion for new trial and petitioner's convictions on May 21, 2003, *Commonwealth v. Smith*, 58 Mass. App. Ct. 166, 788 N.E.2d 977 (2003), and the Massachusetts Supreme Judicial Court denied petitioner's application for leave to obtain further appellate review on October 3, 2003. *Commonwealth v. Smith*, 440 Mass. 1104, 797 N.E.2d 380 (2003).

On December 31, 2003, petitioner filed a petition with this Court seeking a writ of certiorari.

2. *The Facts*

The Appeals Court made the following detailed findings of fact relating to petitioner's crimes:

Co-defendant Felicia Brown lived with her mother, stepfather, and two siblings in a three-story building at 33 Lawn Street, in the Jamaica Plain section of Boston.[3] The Brown

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[3]The Appeals Court added the following in a footnote:

Brown was indicted on charges of being an accessory after the fact and perjury. The perjury indictment was severed. Brown was tried with [petitioner] on the accessory after the fact indictment and was acquitted. Following a separate trial, Brown was convicted on the perjury charge; the conviction was later reversed by this court. *Commonwealth v. Brown*, 55 Mass. App. Ct. 440, 771 N.E.2d 214 (2002).

family occupied part of the second floor of the building and all of the third floor, and rented part of the secnd floor and all of the first floor to tenants.[4]

On August 15, 1996, Christopher Robinson, Brown's cousin, spent the day sitting around the house, drinking alcohol, and smoking marijuana and crack cocaine. At approximately 4:00 A.M., Robinson went from the third floor to the second floor downstairs to lie down. When he reached the bottom of the stairs, he saw Brown and [petitioner] in Brown's bedroom. [Petitioner] was holding what appeared to be a .32 or .38 caliber pistol.

Robinson testified that as he descended from the third to the second floor, [petitioner] shot him three times. [Petitioner] said to Brown, "let's go." Robinson said, "I know who you are, Melvin. Why you shoot me? I know who you are. Your name is Melvin."[5]

Brown and [petitioner] left the house. Robinson sought help from Brown's stepfather, who telephoned the police. The police and paramedics arrived within moments of each other.

While the paramedics attended to Robinson, Boston police Officer Wayne Clark asked Robinson who shot him. Robinson answered, "Melvin." Officer Clark asked for a last name, but Robinson said he did not know it. Officer Clark asked

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[4]The Appeals Court added the following in a footnote:

Patrick Veridieu lived in the first floor apartment and Elaine Shaw lived in the second floor apartment.

[5]The Appeals Court added the following in a footnote:

Immediately after the shooting, Robinson told the police that he did not know Melvin's last name. At trial, however, Robinson testified that Brown had said, "His last name is Smith," as she left the house.

Robinson how he knew Melvin, and Robinson told him that Melvin was his cousin's boyfriend.

The shooting severely injured Robinson and destroyed his digestive tract. While in the hospital, Robinson selected a photograph of [petitioner] from a photographic array and identified [petitioner] as the person who shot him. At trial, Robinson identified [petitioner] as his assailant.

On August 25, 1996, Boston police Detective Tony Smith interviewed Brown in the presence of her mother. Brown said that she and [petitioner] had left because Robinson had been acting crazy and "busting up" the house. Brown told Detective Smith that at the time of the shooting, [petitioner] was in his car and that she had just approached the house. She said that she heard the gunshots as she walked to the door, and that she and [petitioner] drove away, to "Tony's." Brown cried during the interview and explained that she was under a lot of pressure. She said that she and [petitioner] went to a friend's house to use the phone.

The theory of the defense was that Robinson was too intoxicated by drugs and alcohol to correctly identify his assailant and that one of the tenants in the building, Patrick Veridieu, had a motive and an opportunity to shoot him.

Commonwealth v. Smith, 58 Mass. App. Ct. at 167-69, 788 N.E.2d at 980-81.

REASONS FOR DENYING THE WRIT

I. THE APPEALS COURT'S APPLICATION OF EXISTING JURISPRUDENCE TO THIS CASE DOES NOT PRESENT AN IMPORTANT CONFLICT WITH DECISIONS OF THIS COURT, THE CIRCUIT COURTS OF APPEALS, OR ANY OF THE STATE'S HIGHEST COURTS.

Despite petitioner's contentions to the contrary, a review of the Appeals Court's decision in light of existing precedent does not present this Court with an important split of authority among the decisions of this Court, the circuit courts of appeals, or the states' highest courts. As this Court explained in *United States v. Wilson*, permitting the government to *appeal* all acquittals presents the following concerns that the Double Jeopardy Clause is intended to protect against: (1) it would permit the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; (2) it would permit the prosecutor to re-examine the weaknesses in his first presentation of the evidence in order to strengthen a second; and (3) it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal. 420 U.S. 332, 352 (1975). This Court noted, however, that:

> Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.

Id. at 345.

The Appeals Court in this case, along with most of the circuit courts of appeals and state's highest courts, have recognized this distinction and tension in analyzing the particular facts and circumstances of each case in which a trial court reconsidered an initial decision granting, or favorably considering, a motion for required finding of not guilty. Indeed, most of these courts have focused essentially on whether any one of the three concerns noted by this Court in *Wilson* is in play before deciding whether the Double Jeopardy Clause is implicated. Among those that have followed this well-worn path, some have concluded that the facts and circumstances demonstrated a Double Jeopardy violation. *United States v. Blount*, 34 F.3d 865, 868 (CA9 1994) (trial judge granted motion for required finding and informed the jury; jeopardy ended upon that announcement); *People v. Henry*, 789 N.E.2d 274, 285-86 (Ill. 2003) (based upon judge's action in "vacating" rather than "reconsidering" ruling which granted motion for directed verdict, Double Jeopardy precluded submitting charge to jury); *Brooks v. State*, 827 S.W.2d 119, 123 (Ark. 1992) (noting prejudice to defendant's ability to present defense, Double Jeopardy violated when judge reversed prior grant of a motion for directed verdict just before jury charge and charged jury on offense); *State v. Carney*, 374 N.W.2d 59, 61 (Neb. 1985) (Double Jeopardy violated where government allowed set aside its "rest" and adduce more evidence of defendant's guilt after motion for required finding of not guilty granted).

Others have concluded that the facts and circumstances did not warrant a conclusion that Double Jeopardy was implicated. *United States v. Baggett*, 251 F.3d 1087, 1095 (CA6 2001) (oral grant of motion outside jury's presence does not terminate jeopardy), *cert. denied*, 534 U.S. 1167 (2002); *United States v. Byrne*, 203 F.3d 671, 674 (CA9 2000) (motion for required finding granted outside jury's presence not final; reconsideration allowed before further proceedings commenced), *cert. denied*, 531 U.S. 1114 (2001); *United States v. Rahman*, 189

F.3d 88, 133-34 (CA2) (no violation where proceedings concerning motion for required finding and its reconsideration took place outside jury's presence; defendant lost no opportunity to offer further evidence); *cert. denied, Nosair v. United States*, 528 U.S. 982 (1999); *United States v. Washington*, 48 F.3d 73, 79 (CA2) (no violation where motion granted outside jury's presence and judge reversed decision after further proceedings), *cert. denied*, 515 U.S. 1151 (1995); *United States v. LoRusso*, 695 F.2d 45, 54 (CA2 1982) (because jury not dismissed and no judgment entered, oral grant of motion for required finding which was later reversed did not implicate Double Jeopardy), *cert. denied*, *Errante v. United States*, 460 U.S. 1070 (1983); *Commonwealth v. Viglione*, 842 A.2d 454, 468 (Pa. 2004) (no constitutional violation where reconsideration occurred immediately, government did not re-open its case, defendant not subjected to "harassment or uncertainty"); *In the Matter of Lionel F.*, 558 N.E.2d 30, 31 (NY 1990) (no violation where reconsideration of oral grant of motion occurred after defendant rested without calling witnesses), *cert. denied*, *Lionel F. v. City of New York*, 498 U.S. 923 (1990); *State v. Iovino*, 524 A.2d 556, 560 (RI 1987) (no violation where, after judge reconsidered his allowance of motion for required finding, he offered defendant opportunity to present additional testimony, which defendant declined); *People v. District Court*, 663 P.2d 616, 621 (Colo. 1983) (no violation where order and reconsideration occurred outside jury presence, no additional governmental attempt to convict defendant, and defendant not detrimentally affected in presenting a defense by the court's reconsideration).

As the Second Circuit aptly noted in *United States v. LoRusso*: "[t]hese protections have been viewed in a commonsense fashion, and 'where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended.'" 695 F.2d at 53, quoting *United States v. Wilson*, 420 U.S. at 344. Only by abandoning commonsense and, in one case, by focusing on dicta in this

Court's decision in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986) have a few outlier courts determined that a motion judge's reconsideration of allowance of a motion for a required finding of not guilty--when neither the initial decision nor the reconsideration was communicated to the jury, the government presented no further evidence against the defendant, and the defendant suffered no prejudice to his defense--violated Double Jeopardy. *See Lowe v. State*, 744 P.2d 856, 858 (Kan. 1987) (citing dicta in *Smalis* and holding that reconsideration of such a motion violated Double Jeopardy even if no further evidence adduced by prosecution); *State v. Hurst*, 367 So.2d 1180, 1180-81 (La. 1979) (*per curiam*) (jeopardy ended the moment motion for required finding was granted). This Court's holding in *Smalis*, that the government could not *appeal* an entry of acquittal, however, was an unremarkable application of its well-established Double Jeopardy jurisprudence and certainly did not, as petitioner contends, call into question its decision in *United States v. Wilson*. *Smalis v. Pennsylvania*, 476 U.S. at 145.

What petitioner focuses on instead is the Court's dicta in *Smalis*, which of course must be read in light of the particular facts presented in that case: "the Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.'" *Id.* at 145-46, quoting *United States v. Martin Linen Supply*, 430 U.S. 564, 570 (1977).[6] The Court was faced with a unique procedure in Pennsylvania by which a successful appeal of an acquittal would result in a return of the matter to the same finder of fact. *Id.* at 144-45. Simply put, even the Court's dicta in *Smalis* does not tend to disapprove of a trial court's

[6]Petitioner's citations to the decisions by various intermediate state appellate courts add little to the question of whether a conflict exists. SUP. CT. R. 10.

reconsideration of an initial ruling allowing a motion for directed verdict, assuming that the three core concerns noted in *Wilson* are not in issue.

A review of the above-cited decisions in this area demonstrates that the particular decision reached depends upon the facts and circumstances of each individual case, based upon the court's assessment of whether one of the three *Wilson* factors that bear on the Double Jeopardy question is at issue or whether a defendant simply is attempting to benefit from an error of law that could be corrected without subjecting him to a second proceeding. *United States v. Wilson*, 420 U.S. at 345. Indeed, it is noteworthy that the Court denied a petition seeking a writ of certiorari in a case presenting facts very close to those extant in this case: the Second Circuit held that no Double Jeopardy concerns were implicated where the trial judge granted a motion for required finding outside the jury's presence and expressly declined to inform the jury that the motion was granted; the trial resumed; and the trial judge reversed his decision shortly thereafter. *Washington v. United States*, 515 U.S. 1151 (1995). As discussed below, using the lens which the Court provided in *Wilson*, the Appeals Court saw its way clear to a commonsense and correct conclusion that petitioner's Double Jeopardy rights were not implicated by the trial judge's reconsideration of her initial grant of his motion for required finding of not guilty. The petition seeking a writ of certiorari should be denied.

II. THE APPEALS COURT CORRECTLY DETERMINED THAT PETITIONER'S DOUBLE JEOPARDY RIGHTS WERE NOT IMPLICATED BY THE TRIAL JUDGE'S RECONSIDERATION OF HER INITIAL DECISION GRANTING HIS MOTION FOR A REQUIRED FINDING OF NOT GUILTY AS TO ONE OF THE PENDING CHARGES AGAINST HIM.

The Appeals Court correctly applied this Court's existing precedent in reaching its conclusion that petitioner's Double Jeopardy rights were not implicated by the trial judge's reconsideration of her initial decision to grant his motion for a required finding of not guilty. It first noted that "double jeopardy protections were not violated in these circumstances because the judge's correction of her ruling did not require a second proceeding." *Commonwealth v. Smith*, 58 Mass. App. Ct. at 170, 788 N.E.2d at 982; *see United States v. Wilson*, 420 U.S. at 335, 344 ("the constitutional restriction on governmental appeals is intended solely to protect against exposing the defendant to multiple trials, not to shield every determination favorable to the defendant from appellate review[;]" "where there is no risk of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended."). The Appeals Court went on to quote *Wilson*, noting that, indeed, finding a Double Jeopardy violation based upon the facts of this case would grant petitioner an unwarranted benefit. *Id.* at 170, 788 N.E.2d at 982. The court went on to elucidate what facts and circumstances presented in this particular case warranted such a conclusion. It pointed out that "[t]he defendant has not suggested that the initial allowance of the motion affected his trial strategy with regard to

the other charges." *Id.* at 171, 788 N.E.2d at 983.[7] The Appeals Court highlighted the significant facts that the Commonwealth did not present any additional evidence and that petitioner had the option to re-open his case. *Id.*, 788 N.E.2d at 983. Finally, it noted both that the evidence against petitioner on the firearm charge was not insufficient as a matter of law and that petitioner was not prejudiced by the ruling since the jury was not informed of either the initial ruling or the reconsideration. *Id.*, 788 N.E.2d at 983. The Court should deny the petition seeking a writ of certiorari.

CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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May 12, 2004

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[7]Neither did petitioner present in his brief to the Appeals Court any argument that he might have changed his strategy as to the firearm charge. As such, this Court should disregard petitioner's argument to that effect, *see* Petition, at 7, where it is being made for the first time here.